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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 74.

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

MOTION FOR REHEARING AND SUGGESTIONS IN SUPPORT THEREOF.

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LEWIS K. STONER, PETITIONER,

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NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

MOTION FOR REHEARING.

Comes now the respondent, New York Life Insurance Company, a corporation, and moves the court to grant it a rehearing in this cause for the following reasons:

1. This court erroneously held that the district court applied the rule announced by the intermediate state appellate court, the Kansas City Court of Appeals. An application of the rule announced by the Kansas City Court of Appeals to the facts as specifically found by the district court requires a finding against total disability.

2. The court overlooked and failed to pass upon the contention of the respondent that a conflict existed between the intermediate state courts of Missouri.

Respectfully submitted,

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SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING.

1.

This court erroneously held that the district court applied the rule announced by the intermediate state appellate court, the Kansas City Court of Appeals. An application of the rule announced by the Kansas City Court of Appeals to the facts as specifically found by the district court requires a finding against total disability.

In its opinion in the case at bar this court assumed that the district court recognized and applied the law with respect to total disability as declared by the intermediate state appellate court. It so states in the opinion as a basis for the affirmance of the judgment of the district court. Respondent respectfully submits that the conclusion of law announced by the district court (Tr. 99) is not in accordance with the rule announced and applied by the Kansas City Court of Appeals (232 Mo. App. 1048, 114 S. W. 2d 167).

Under the provisions of the Federal Rules of Procedure the district judge trying the case without a jury made specific findings of fact and announced its conclusion of law. Its memorandum opinion sets forth the facts specifically found therein. The court then set forth its conclusion of law which it applied to the facts found and arrived at the ultimate "Finding of Fact" of total disability (Tr. 100). This last so-called finding of fact resulted directly from the conclusion of law applied. If this conclusion of law is erroneous in light of the rule of the intermediate state court the judgment of the district court should not be affirmed. We submit that it is erroneous.

The conclusion of law announced by the district court is as follows:

> "To have a declaratory judgment that it is not liable on account of total and presumably permanent disability under (fol. 102) a policy of insurance such as is involved in this case an insurance company must prove by the preponderance or greater weight of the credible testimony that the insured can do any work; or that he can follow any occupation, that is, any of those occupations by which men earn livelihoods for themselves and their families, himself performing such of its duties as substantially constitute that occupation; or that he can engage in any business for remuneration or profit, that is, in any of those businesses by which men earn livelihoods for themselves and their families, himself performing such of its duties as substantially constitute that business."

This conclusion of law placed upon the respondent an insurmountable burden. Under the facts of this case the respondent could never have secured a favorable finding. Nevertheless, the Kansas City Court of Appeals had held that the evidence would support a finding in favor of the respondent. In its opinion from the last appeal the Kansas City Court of Appeals summarized its rule as follows:

> (*Stoner* v. *New York Life Insurance Company*, 232 Mo. App. 1048, 114 S. W. 2d 167:) "We further held, 90 S. W. 2d 784, l. c. 797, that the conceded inability of plaintiff to perform labor, which was part of his substantial duties, would not justify, as a matter of law, a verdict for the plaintiff; that plaintiff would not be entitled to recover, notwithstanding he could not perform farm labor by reason of his injuries, if he nevertheless had the ability to substantially perform his occupation by discharging duties, other than farm labor."

The opinion of the district court and of this court fails to give effect to this phase of the rule of the state intermediate appellate court.

The adoption by the district court of an erroneous conclusion of law vitiated the judgment rendered by the district court.

The petitioner's injuries consisted simply of a stiffened ankle which prevented him from performing that part of the farm labor which required the continuous use of both feet. He was otherwise healthy and able. He did engage in farming as a business for remuneration and profit and earned a livelihood and a profit in addition. It is settled that this court should require application of the proper state law in cases of this character. But its duty does not end with correcting the opinion of the circuit court of appeals. It should follow through and see that the district court properly applies the law. In this case the job has been only half done.

2.

The court overlooked and failed to pass upon the contention of the respondent that a conflict existed between the intermediate state courts of Missouri.

In its brief the respondent submitted to this court the contention that the rule announced by the St. Louis Court of Appeals and the Springfield Court of Appeals supported the conclusion of the circuit court of appeals and was in conflict with the petitioner's construction of the opinion of the Kansas City Court of Appeals (Respondent's Brief pages 23 to 30). This court inadvertently overlooked this contention and failed to mention or pass upon it in its opinion. The important questions of the existence and of the effect of conflict in state intermediate courts of appeal of less than statewide jurisdiction is vital and should be passed upon.

The opinion of the Springfield Court of Appeals of Missouri in conflict with the Kansas City Court of Appeals opinion is that of *Jones* v. *Metropolitan Life Insurance Company*, 130 S. W. 2d 967. The opinions of the St. Louis Court of Appeals in conflict with the Kan-

sas City Court of Appeals are those of *Smith* v. *Metropolitan Life Insurance Company*, 108 S. W. 2d 995, and *Eden* v. *Metropolitan Life Insurance Company*, 138 S. W. 2d 745.

The Eden case is cited in support of this court's conclusion in affirming the district court. The Eden case is in conflict with the judgment of the district court and supports the judgment of the opinion of the circuit court of appeals.

In any event respondent is entitled to have this decisive contention examined and passed upon by this court. Because it was overlooked a rehearing should be granted.

Respectfully submitted,

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